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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

ALTERMAN TRANSPORT LINES, INC., ET AL.,
Appellants,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE, ET AL.,
Appellees.

JURISDICTIONAL STATEMENT

PARTIES TO APPEAL

The Appellants to this appeal are twenty-seven irregular-route interstate motor carriers.[1]

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[1] Alabama Highway Express, Inc., a body corporate and a resident of the State of Alabama; Bowman Transportation, Inc., a body corporate and a resident of the State of Alabama; Deaton Truck Line, Inc., a body corporate and a resident of the State of Alabama; Refrigerated Transport Co., Inc., a body corporate and a resident of the State of Georgia; Virginia-Carolina Freight Lines, Inc., a body corporate and a resident of the State of Virginia; Armellini Express Lines, Inc., a body corporate and a resident of the State of Florida; Bilyeu Refrigerated Transport Corporation, a body corporate and a resident of the State of Missouri; Commercial Carrier Corporation, a body corporate and a

OPINION

The opinion delivered in the court below is not as yet reported. A copy of the opinion is attached as Appendix I.

JURISDICTION OF APPEAL

This is an appeal from a three-judge decision of the United States District Court for the District of Tennessee, Middle Division, denying Appellants injunctive relief against the enforcement of a state statute alleged to be unconstitutional. The specially convened lower court dismissed the Complaint and denied a Motion for Preliminary Injunction for want of federal jurisdiction by Order dated October 11,

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resident of the State of Florida; Pre-Fab Transit Co., a body corporate and a resident of the State of Illinois; Holloway Motor Express, Inc., a body corporate and a resident of the State of Alabama; Jack Cole Company, Inc., a body corporate and a resident of the State of Alabama; Diamond Transportation Systems, Inc., a body corporate and a resident of the State of Wisconsin; Fischbach Trucking Co., a body corporate and a resident of the State of Ohio; Florida Refrigerated Service, Inc., a body corporate and a resident of the State of Florida; Greenstein Trucking Company, a body corporate and a resident of the State of Florida; Melton Truck Lines, Inc., a body corporate and a resident of the State of Arkansas; Ringle Express, Inc., a body corporate and a resident of the State of Indiana; Warren Transport, Inc., a body corporate and a resident of the State of Nebraska; Webb Transfer Line, Inc., a body corporate and a resident of the State of Kentucky; Frozen Food Express, a body corporate and a resident of the State of Texas; Hennis Freight Lines, Inc., a body corporate and a resident of the State of North Carolina; Blue Ridge Transfer Company, Inc., a body corporate and a resident of the State of Virginia; Floyd & Beasley Transfer, Inc., a body corporate and a resident of the State of Alabama; Eagle Motor Lines, a body corporate and a resident of the State of Alabama; Alterman Transport Lines, Inc., a body corporate and a resident of the State of Florida; Harper Motor Lines, Inc., a body corporate and a resident of the State of Georgia; Yeary Transfer Company, Inc., a body corporate and a resident of the State of Kentucky.

1966 (a copy of the Order is attached as Appendix II). The Court held that while a substantial federal question was presented, the jurisdiction of a United States Federal Court could not be invoked under those sections of the *United States Code* which provide for jurisdiction without a requirement as to the "value" of the "matter in controversy", and, that the "matter in controversy" did not involve the $10,000 "value" required for jurisdiction under those sections of the *Code* which demand a minimum jurisdictional amount. A Notice of Appeal to this Court was filed in the District Court of the United States, for the Middle District of Tennessee, on November 8, 1966.

I

STATUTORY PROVISION FOR APPEAL

The jurisdiction of this appeal is based on Title 28 of the *United States Code,* Section 1253.

II

CASES SUSTAINING JURISDICTION

The following cases sustain the jurisdiction of this appeal: *Baker* v. *Carr,* 369 U.S. 186 (1962); *Kesler* v. *Dept. of Public Safety,* 369 U.S. 153 (1962); *Florida Lime Growers* v. *Jacobsen,* 362 U.S. 73 (1960); *Evers* v. *Dwyer,* 358 U.S. 202 (1958); *Doud* v. *Hodge,* 350 U.S. 485 (1956); *Query* v. *United States,* 316 U.S. 486 (1942); *California Water Service Co.* v. *Redding,* 304 U.S. 252 (1938). The *Florida, Evers,* and *Doud* cases are identical to the instant case in that in these cases direct appeals were allowed by this Court from three-judge district court decisions dismissing cases on jurisdictional grounds without a ruling on the merits. (See, for example, the Jurisdictional Statement in the *Florida* case—No. 49, 1958 Term at pages 3, 4; 14 and

15. That Appellants have an absolute right of appeal to this Court from a final judgment rendered by a properly convened three-judge court, see *Radio Corp.* v. *United States,* 341 U.S. 412, 415 fn. 4, aff. 95 F. Supp. 660, 664 (1951).

In an injunctive action challenging a state statute on a substantial federal constitutional ground, both the three-judge court and this Court on direct appeal have jurisdiction over all claims raised against the state statute. Once a three-judge court has obtained jurisdiction by virtue of a substantial federal question, it, and this Court, can dispose of a case on non-constitutional grounds, or even a local issue, and both courts can do so without passing upon the federal question upon which they based jurisdiction. See *Zemel* v. *Rusk,* 381 U.S. 1 (1965); *U. S.* v. *Georgia Pub. Serv. Comm'n,* 371 U.S. 285, 287 (1963); *Florida Lime Growers* v. *Jacobsen, supra*; *Query* v. *United States, supra* p. 4; *Lee* v. *Bickell,* 292 U.S. 415 (1934); *Moore, Federal Practice* § 0.205, Note 33 (2d ed. 1948); and 1 *Barron & Holtzoff, Federal Practice and Procedure* § 52, p. 287 (1960).

STATUTE INVOLVED

The validity of *Chapter 9, Title 67 of the Tennessee Code Annotated* is challenged by Appellants. A copy of the pertinent provisions of this chapter is attached hereto as Appendix III.

QUESTIONS PRESENTED

1. Whether the failure of the Tennessee tax officials to assess property for ad valorem taxes on a uniform standard of valuation by the systematic, intentional and long-standing practice of over-valuation of the

property of Appellants and others who are centrally assessed by the Public Service Commission of Tennessee, while at the same time systematically undervaluing the property of persons assessed locally and not centrally by the Public Service Commission of Tennessee, but who are similarly situated under the laws and Constitution of Tennessee which require that *all* persons who own property in Tennessee be taxed in an equal and uniform manner with no species of property taxed any higher than any other species of property, constitutes such long-standing discrimination that Appellants are denied "Equal Protection under the Law" as guaranteed by the Fourteenth Amendment to the Constitution of the United States and by *Title 28, Section 1343 of the United States Code,* and whether, under said section of the *United States Code,* jurisdiction over the instant case is properly invoked in a United States Federal District Court.

2. Whether the requirement contained in *Tennessee Code Annotated 67-906 B(2),* that irregular-route motor carriers shall report the number of vehicle miles operated in each county, municipality or taxing district in Tennessee, enforced through regulations of the Defendant State of Tennessee Public Service Commission, imposed upon Appellants such an impossible task, and one where compliance is so expensive, causes such great delays, and creates such dangerous highway hazards as to render said provision void under Article I, Section 8 of the Constitution of the United States, and whether said section has severely hindered the efforts of Appellants to fulfill their duties and obligations to render speedy, efficient, economical service as required by the *Interstate Commerce Act of 1940,* 54 Stat. 899 (1940), and whether said section of

the *Tennessee Code Annotated* is in such conflict with the *Interstate Commerce Act,* so as to render it void under the Supremacy Clause, Article V1, Clause 2, of the Constitution of the United States, and is in such conflict with the *Interstate Commerce Act* that the jurisdiction of a United States Federal Court is properly invoked in the instant case by virtue of *Title 28, Section 1337 of the United States Code.*

3. Whether in addition to those sections of the *United States Code* which confer jurisdiction on a Federal District Court without a showing of "jurisdictional amount", the amount in controversy in the instant case meets the federal jurisdictional requirement of the $10,000 "value" of the "matter in controversy."

A. Whether the $10,000 "amount in controversy" is present in the instant case by reason of the fact that a sum greatly in excess of this amount has accrued against many of the Appellants under *Tennessee Code Annotated 67-913* which states that an irregular-route carrier such as Appellants "shall . . . be liable to a penalty of one hundred dollars ($100.00) for each and every day which such owner is delinquent in filing" the mileage information required by *Tennessee Code Annotated 67-906 B(2).*

B. Whether the cost incurred by Appellants in complying with *Tennessee Code Annotated 67-906 B(2)* is in excess of, and should be included in computing for jurisdictional purposes, the "value" of the "matter in controversy" in the instant case.

C. Whether in computing the "value" of the "matter in controversy" an individual Appellant can aggregate the ad valorem taxes it owes to all the

counties and municipalities of Tennessee by reason of the fact that said taxes are assessed centrally by the Public Service Commission of Tennessee and State Board of Equalization, and whether or not there has been such a long-standing, systematic and intentional discrimination practiced by Defendants against the property interests of Appellants, so that a "conspiracy of action" must be implied which entitles each individual Appellant to aggregate all the taxes owed by him to the respective counties and municipalities of Tennessee in computing "amount in controversy" for purposes of federal jurisdiction.

4. Whether the three-judge Federal District Court abused its discretion in disregarding and dismissing as unreasonable on its face the allegations contained in the uncontradicted and verified Bill of Complaint as amended, and Affidavits of Appellants concerning the reporting requirements of *Tennessee Code Annotated 67-906 B(2)*.

5. Whether the Federal District Court abused its discretion in granting the Defendants' Motions to Dismiss as to the Plaintiff, Commercial Carrier Corporation, under the venue Statute 28 *United States Code* Section 1391.

6. Whether *Chapter 9 of Title 67, Tennessee Code Annotated* (and particularly Sections 67-901, 67-906 B(2), 67-913, 67-920 B(2), 67-931) is in violation of the "Due Process Clause" of Section 1 of the Fourteenth Amendment to the United States Constitution by reason of the fact that it permits a county (95 in Tennessee), municipality (several hundred), or taxing district (innumerable) to levy and collect ad valorem taxes upon personal property of a non-resident of

Tennessee although the personal property of the non-resident has acquired no actual tax situs therein by being regularly and habitually within said county, municipality or taxing district, or regularly and habitually in the State of Tennessee.

7. Whether *Chapter 9 of Title 67, Tennessee Code Annotated* is in violation of Article I, Section 8 of the Constitution of the United States in creating an undue burden on interstate commerce by reason of the fact that said statute results in Appellants being subjected to "multiple taxation"; i.e., taxation totalling more than 100% of the value of their rolling stock, due to the fact that Appellants' states of domicile have not, and are not, required under the laws and Constitution of the United States to recognize or give credit for ad valorem taxes paid by Appellants in the State of Tennessee as the taxes and assessments in Tennessee are based purely on a fictional or statutory situs and not on an actual situs resulting from Appellants' property being regularly or habitually in the State of Tennessee.

8. Whether the method of assessing ad valorem taxes in Tennessee results in a discriminatory and higher assessment being imposed on motor vehicles operating in interstate commerce, such as Appellants, as opposed to motor vehicles operating in intrastate commerce within the borders of Tennessee, creates an undue burden on interstate commerce in violation of the Commerce Clause, Article I, Section 8 of the Constitution of the United States.

9. Whether the three-judge United States Federal Court abused its discretion in denying Appellants' Motions for a Temporary Restraining Order and a

Preliminary Injunction by reason of the fact that Appellants' verified Bill of Complaint, as amended, and Affidavits, demonstrate a reasonable probability of the presence of a substantial federal question, and of irreparable damage to the Appellants if it is not granted, as well as a reasonable probability that federal jurisdiction is either present under a section of the *United States Code* that does not require the showing of a jurisdictional minimum, or if under a section where jurisdictional minimum is required, that there is a reasonable probability that such amount is present as to each of Appellants.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The jurisdictional questions presented by this appeal are of substantial national importance in their bearing on the function of federal courts. This importance is magnified by the fact that the substantive merits of the case contain extremely important questions of constitutional law in regard to the state taxation of vehicles engaged in interstate commerce and the free flow of said commerce among the states.

The Appellants alleged in their Bill and supported with Affidavits the fact that *T.C.A.* 67-901-931 has been invidiously, intentionally, and over a long period, systematically applied against them, by Defendants, in a discriminatory manner. Defendants have not denied this discriminatory practice, and the lower court held that said practice not only exists but also that it raises a substantial federal question under the "Equal Protection Clause" of the Fourteenth Amendment to the Constitution of the United States. Solely on this ground, and without considering the other constitutional attacks on the Tennessee statute raised

in Appellants' Bill of Complaint, it is a flaunting of national policy for a federal court to refuse to exercise its jurisdiction. *The lower court's decision not to exercise jurisdiction, coupled with its correct holding that the state courts of Tennessee do not provide an adequate remedy to redress this discrimination, results in a situation that leaves Appellants no forum in which to seek relief from an admittedly discriminatory tax.* If the lower court's refusal to accept jurisdiction is allowed to stand, it will leave Tennessee and other states free to tax interstate commerce in a discriminatory manner. The only restriction on this practice, based on the opinion below, is the limit of a respective state's ingenuity in manipulating the form in which the discriminatory taxes are collected. In the State of Tennessee, for example, many of Appellants have a tax liability considerably higher than $10,000. (See Plaintiffs' Exhibit H, attached hereto as Appendix IV.) However, because of the manner in which it is distributed among the 95 counties and innumerable municipalities in Tennessee, Appellants have been denied redress in the United States Federal Courts.

One of the principal reasons for the formation of the federal government, as expressed in Article 1, Clause 8 of the Constitution of the United States, and in Congressional legislation, is to insure that interstate commerce is not unduly burdened by discriminatory taxes or otherwise. Congress has created and empowered the federal courts with jurisdiction to provide a forum for the redress of any infringement of this purpose. In the instant case, not only is an unconstitutional restriction on the free flow of interstate commerce presented, but also the District Court has

concluded that no adequate, legal remedy exists for Appellants in the state courts. In such a situation, it is the obligation of a federal court to exercise its jurisdiction. Thus, the issue presented in this appeal, which is of vital national importance, is the measure of protection to be afforded by the federal courts in preserving the national transportation policy from discriminatory and unconstitutional state taxation.

STATEMENT OF CASE

Chapter 9, Title 67, T.C.A. provides for the assessment of utilities and transportation carriers by the Tennessee Public Service Commission, and the distribution of such assessments to various counties, municipalities, and taxing districts for local taxation. It provides that irregular-route motor carriers, by virtue of even the slightest operation in the state of Tennessee, will be deemed to have a taxing situs for ad valorem purposes within the state of Tennessee. Such Chapter also provides that the Commission is to compute ad valorem assessments based on a complex formula which takes into account the total revenue of such carrier, its total capital, its net operating revenue, and its mileage operated in each of the Tennessee counties, municipalities, or taxing districts. The local subdivisions apply their own particular tax rate both as to the assessments certified to them by the Commission, and to property which is permanently located within their jurisdictions and which they assess locally. The Tennessee State Board of Equalization has the duty of equalizing the assessments so that the property that is assessed by the Tennessee Public Service Commission and the property assessed locally by the subdivisions are both assessed at exactly the

same rate. As Appellants are all non-residents of Tennessee, they have no property located permanently in Tennessee (with the exception of several of the carriers who own negligible amounts of property within the State); consequently, all of their property is assessed centrally by the State Public Service Commission.

It will be noted from Appendix III that under *T.C.A.* 67-906 B(2) all irregular-route motor carriers are required to report bi-annually the number of miles operated in or through Tennessee, and also ". . . the number of vehicle miles operated during the prior calendar year within, into and/or through each county, incorporated municipality or taxing district . . ."; and that *T.C.A.* 67-913 provides that any carrier who fails to make the required report shall be deemed to have waived the mode and manner of the assessment and the distribution thereof, and further be subjected to a penalty of $100.00 per day for its delinquency. Under this section, when the Commission is not furnished the mileage in the various counties, municipalities, and taxing districts, it may arbitrarily distribute the total assessment to any of the counties, municipalities or taxing districts of the state. In addition, this section also provides that failure to comply with its requirements results in forfeiture of the right to protest the amount of assessments.

The Appellants are twenty-seven non-residents of Tennessee, irregular-route motor carriers, engaged exclusively in interstate commerce. The Tennessee Public Service Commission assesses Appellants' property bi-annually, in the odd years, by sending them forms on which must be listed considerable financial data concerning their corporations and the miles

operated in Tennessee broken down by counties, municipalities, and taxing districts. On even years, the Commission assesses Appellants by sending them Supplemental Ad Valorem Assessment Reports on which Appellants are required to list all property which they have acquired since the preceding odd-year assessment. This supplemental report is required to be filed by the Appellants no later than April 1 in a given even year. Appellants instituted this suit on the first court day, April 4, 1966 (a Monday) following said date of April 1, 1966 (a Friday), in the Federal District Court, Middle District of Tennessee, against the Tennessee Public Service Commission, the State Board of Equalization, and all of the counties and municipalities of Tennessee, requesting, among other things, a temporary injunction against the distribution of the 1966 even-year Supplemental Assessments by the Public Service Commission. (The counties and municipalities were sued as "class defendants" as provided for under Rule 23 of the *Federal Rules of Procedure,* and six of the largest counties and municipalities were named as representatives for the class).

The principal facts and arguments on which Appellants rely, both as to the substantiality of the federal questions and the presence of federal jurisdiction, can be divided into three basic categories. The first pertains to the fact that through *T.C.A.* 67-901-931 the State of Tennessee authorizes its counties and municipalities to tax non-resident irregular-route carriers by motor vehicle, such as Appellants, on the basis of a fictional situs, which has no relation to regular or habitual use of, or presence on, the roads in Tennessee. Appellants contend that this fictional situs is unconstitutional in two separate respects. One, it violates

the "Due Process Clause" of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that Appellants do not have a sufficient connection with the State of Tennessee to justify a taxing nexus or situs therein.[1] Second, the *Tennessee Code* section in question violates the Commerce Clause, Article 1, Section 8 of the Constitution of the United States in that it subjects Appellants to prohibitive administrative expense by compelling them to pay ad valorem taxes in the various states through which they may have occasion to operate, and in addition, subjects Appellants' property to "double or multiple taxation", unduly burdening the free flow of interstate commerce.[2]

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[1] See *Central Railroad Co.* v. *Commonwealth of Pa.*, 370 U.S. 607 (1962), for summary and synthesis of this Court's decisions on state ad valorem taxation of moving equipment engaged in interstate commerce; especially at page 370 U.S. 614, 615 and 616, where it is clearly stated that an irregular-route carrier can never be subjected to ad valorem taxes in a non-domiciliary state unless the non-domiciliary state can demonstrate an habitual employment of the carrier's property within its jurisdiction. See also *Commercial Carriers, Inc.* v. *Kentucky Tax Comm'n.*, 321 S.W. 2d 42 (1959), where the Kentucky Court of Appeals held that a nearly identical statute to *T.C.A.* 67-901-931 was unconstitutional as applied to an irregular-route motor carrier.

[2] The multiple taxation results from the fact that Appellants' states of domicile tax for ad valorem purposes 100% of Appellants' property, including Appellants' rolling stock which on occasion may pass through and be taxed in Tennessee. The states of domicile do not, and are not, required to give a credit for the additional ad valorem taxes paid to states such as Tennessee which base their taxing situs on a purely legislative or fictional basis and not on an actual situs resulting from habitual employment of property within the jurisdiction. See Plaintiffs' Exhibit G, attached hereto as Appendix V. See also *Central Railroad Co.* v. *Commonwealth of Pa.*, *id.*, and *N.Y. Central Railroad* v. *Miller*, 202 U.S. 584, 597 (1906).

The second area upon which Appellants attack the Tennessee statute in question is that area of problems created by *T.C.A.* 67-906 B(2). This section requires irregular-route carriers, such as Appellants, to report the total number of vehicle miles operated each year in Tennessee, broken down into counties, municipalities, and taxing districts. Appellants have alleged in their Bill of Complaint and submitted affidavits to the effect that the Tennessee Public Service Commission insisted upon literal compliance with the reporting requirement of the section, and that in complying with said requirements, they have been compelled not only to spend sums of money each year exceeding the amount of the taxes levied for the year, but also that they have been compelled to disregard normal safety precautions prescribed in the *Interstate Commerce Act*. *T.C.A.* 67-906 B(2) violates the Commerce Clause, Article 1, Section 8 of the Constitution of the United States in unduly burdening an interstate carrier with exorbitant "bookkeeping costs", and the Supremacy Clause of the federal constitution by conflicting with Congressional regulation of interstate commerce.

The third category of facts relied on by Appellants concerns the discriminatory manner in which *T.C.A.* 67-901-931 is applied. Appellants alleged in their Bill, and submitted affidavits and exhibits to the effect that their property has been systematically, intentionally, and for a long period, assessed by the Defendants at actual value, i.e., on 100% of its value, while Defendants have at the same time systematically assessed other property in Tennessee at a maximum of 50% of its value, and, in most instances, at a much lower percentage. Defendants have not denied the above allegations and the District Court held that the above

discriminatory ratios did in fact exist and that this discrimination practiced against Appellants violated the Constitution of Tennessee which requires all property to be assessed equally for ad valorem purposes and raised under the Equal Protection Clause to the Fourteenth Amendment of the Constitution of the United States a substantial federal question.

Defendants Have Denied Appellants Equal Treatment and Protection Under the Law as Required by 28 U.S.C. Section 1343(3) and the Fourteenth Amendment to the Constitution of the United States. Consequently, Federal Jurisdiction Is Proper in the Instant Case Without Regard to the Value of the Matter in Controversy

Title 28 *U.S.C.* Section 1343(3), provides that the federal district courts shall have original jurisdiction of any civil action:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . .

The central error in the decision below as to jurisdiction under this section lies in the following statement in the Court's opinion:

> (Appendix I, p. 8) A mere allegation of discrimination is insufficient to invoke Civil Rights Act jurisdiction automatically. Where plaintiffs' remedies are of the sort classically associated with tax actions and the claims are of a property nature, a Federal court should not accept jurisdiction solely on this basis.

It is true that the courts have held that artful pleading or mere allegations of discrimination in a bill of com-

plaint are insufficient to raise Section 1343 jurisdiction. However, Appellants have gone much further than mere allegations, and the lower court's statement in this regard is inconsistent with its holding that "the question of equal protection raised by plaintiff's assertions that utility property is systematically assessed on the basis of higher assessments than non-utility property, in violation of the state constitution, . . . presents a federal question within the terms of 28 *U.S.C.A.* 1331." (Appendix I, p. 6). The fact that the discrimination demonstrated by Appellants not only raises a federal question but *definitely* results in a Fourteenth Amendment Equal Protection violation is established in the 1966 case of *Louisville & Nashville R. Co.* v. *Public Serv. Comm'n of Tenn.*, 249 F. Supp. 894 (M.D. Tenn. 1966) which held that the *identical* discrepancy in assessment ratios demonstrated in the instant case violated the Equal Protection Clause of the Fourteenth Amendment. The courts have repeatedly held that if a complainant demonstrates that as a result of a state law or the application of a state law, he is discriminated against in a manner that raises a substantial federal question under the "Equal Protection Clause" of the Fourteenth Amendment to the United States Constitution, then the jurisdiction of a United States Federal Court is properly invoked under the *Civil Rights Act* regardless of the "value" of the "matter in controversy" and regardless of whether or not the interest the complainant seeks to protect from discrimination is a personal one or one involving his property and measurable through pecuniary valuation.

The District Court in the instant case confused the distinction that is made by the courts in situations

where "due process" or "privilege and immunities" violations are demonstrated as opposed to instances where an "equal protection" violation is present. As to the former (see *Hague* v. *C.I.O.*, 307 U.S. 496 (1939)), this Court has held that Section 1343 jurisdiction cannot be invoked when state action threatens a property right, that is, a right measurable in monetary value. Concerning the latter, however, this Court has held that as a violation of the "Equal Protection Clause" inherently involves the right to be treated equally with some other *person,* the monetary or property basis which underlies the unequal treatment is irrelevant. That is, as unequal treatment always involves the personal right to be treated equally with the other members of your class, the question as to whether the unequal treatment results from discrimination under a taxing statute or under a public accommodations law is unimportant, and the violation of the personal right to equal treatment always raises *Civil Rights Act* jurisdiction. (*Snowden* v. *Hughes,* 321 U.S. 1 (1944)).

The District Court in rejecting *Civil Rights Act* jurisdiction relied entirely on the two lower court cases of *Detroit Edison Co.* v. *East China Township School District,* 247 F. Supp. 296, 303 (E.D. Mich. 1965), and *Olan Mills, Inc., of Tennessee* v. *Opelika, Alabama,* 207 F. Supp. 332, 336 (M.D. Ala. 1962), neither of which has applicability in the instant case. The important element missing in these cases was a showing of an "equal protection" violation. In these cases the allegations concerning equal protection or the plaintiff's averments as to discrimination were summarily dismissed *before* Section 1343 jurisdiction was discussed.

The most significant case to rule on the applicability of federal jurisdiction through combining a Fourteenth Amendment "equal protection" violation with Section 1343 is the United States Supreme Court case of *Snowden* v. *Hughes* (*supra*, p. 18). This case was cited and discussed at considerable length below, both by Appellants and Appellees; however, it, along with other decisions of this Court on the subject were completely ignored and not even referred to by the District Court. In *Snowden*, there was no allegation of jurisdictional amount by complainant, the *Civil Rights Act* was the only possibility for federal jurisdiction, and the Court at no time in the opinion departed from the question of jurisdiction under the *Civil Rights Act*. *The entire opinion is a study in exactly under what situations involving a Fourteenth Amendment violation this Court is and is not going to permit jurisdiction under Section 1343; and more particularly what constitutes an "equal protection" violation that will invoke jurisdiction under Section 1343.* The Court explained the circumstances under which an "equal protection" violation comes within the purview of the Fourteenth Amendment and Section 1343 by setting out in great detail examples of situations and cases where state action resulted in a violation of the personal right to be treated equally with persons similarly situated.[3] It is the example given by the Court, set

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[3] *Snowden* v. *Hughes* (*supra*, p. 18, at p. 321 U.S. 9): *"Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic*

out in Footnote 3 herein, which has particular application to the instant case. Indeed, an examination of the ten cases cited in support of this example reveals that ninety percent dealt with factual situations so similar to that of our present case that they are indistinguishable. In nearly all of these cases, as in the instant case, tax officials were required by state law to tax on a uniform standard. The intentional, systematic, long-standing practice of consistent under-valuation of the property of some taxpayers and systematic over-valuation of the property of others was held in these cases and has always been held by this Court to result in a denial of a person's civil rights to be treated equally under the law. In the *Snowden* case, the Court concluded that "it was not intended by the Fourteenth Amendment and the *Civil Rights Act* that all matters formerly within the exclusive cognizance of the states should become matters of national concern," and that jurisdiction should be denied where "accidental" as opposed to "purposeful" discrimination was present. (*Snowden* v. *Hughes, supra,* p. 18, at p. 321 U.S. 11). The example and the

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under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute. Coulter v. *Louisville & N. R. Co.*, 196 U.S. 599, 607, 609, 610; *Chicago B. & Q. Ry. Co.* v. *Babcock*, 204 U.S. 585, 597; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350, 353; *Southern R. Co.* v. *Watts*, 260 U.S. 519, 526. [Footnote included as follows:] See also *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 36; *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 447; *Bohler* v. *Calloway*, 267 U.S. 479, 489; *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23, 25, 28; *Great Northern Ry. Co.* v. *Weeks*, 297 U.S. 135, 139." (emphasis added)

cases cited by the Court leave no doubt, however, that if the Court had had the facts of the instant case before it, the element of "purposeful discrimination" would definitely have been demonstrated and jurisdiction upheld under the *Civil Rights Act.* The "intentional" or "purposeful" aspect of the discrimination in the instant case was ruled on specifically in the previously cited case of *Louisville & Nashville R. Co.* v. *Public Serv. Comm'n. of Tenn., supra,* p. 17, where the Federal District Court for Tennessee had before it the requisite $10,000 jurisdictional amount, and held in deciding on the merits of the Fourteenth Amendment question raised herein that the discrepancy in ad valorem assessment ratios practiced in Tennessee against interstate carriers was "clearly invidious discrimination which is systematic, *intentional,* and of long-standing" (at p. 249 F. Supp. 898 (emphasis supplied); see also the cases set out in Footnote 3 herein where the long-standing practice of over-valuing the property of some taxpayers while under-valuing the property of others similarly situated has consistently been held by this Court as "purposeful discrimination".)

The requirement of "intentional" discrimination imposed in Section 1343 "Equal Protection Cases", greatly restricts the number of cases that come within *Civil Rights Act* jurisdiction and eliminates any danger of the federal courts being deluged by such cases. In the tax area, for example, ninety-nine percent of the constitutional attacks on state taxing statutes are on "due process" or "privileges and immunities" grounds, and it is the extremely rare case that raises a substantial federal question on "equal protection" grounds. The instant case presents one

of those unusual circumstances in which a taxpayer is able to demonstrate that a taxing statute is discriminatorily applied in such a way that he is not treated equally with other persons in his taxing class.

The only lower court ever to deal with the exact situation presented in the instant case; i.e., where an equal protection violation *definitely* was demonstrated as a result of discrimination in the application of a taxing statute, had no difficulty in invoking *Civil Rights Act* jurisdiction. (See *Schlosser* v. *Welsch,* 5 F. Supp. 933, 996, 997 (D. S.D. 1934), which dealt with a state taxing statute, valid on its face, but administered by officials in such a manner as to discriminate against certain members of a class who by state law were required to be treated in the same way as the other members of the class. Also see the United States Supreme Court cases cited in the *Schlosser* case at p. 5 F. Supp. 997) . The *Schlosser* case was recently cited with approval by the 1962 case of *Abernathy* v. *Carpenter,* (208 F. Supp. 793 (D. Mo.)) where the Court, in summarizing and approving the *Schlosser* case, stated (at p. 208 F. Supp. 795) that the "arbitrary exclusion of a person rightfully belonging to a class of persons," for purposes of taxation, is a denial of "equal protection" and "undoubtedly" within the intent of the *Civil Rights Act.* The class to which Appellants logically, and legally belong, and from which they have been arbitrarily excluded is that class which under the Constitution and laws of Tennessee is composed of *all* the persons owning property in Tennessee. (See Appendix VI). The basis for jurisdiction in the instant case rests on the personal right of Appellants to be treated equally, as required by

the laws and Constitution of Tennessee, with other persons who are in the same class as themselves, and, as brought out in *Snowden, Schlosser,* and *Abernathy,* the fact that the underlying basis of the unequal treatment is a tax is irrelevant. (For other cases invoking Section 1343 jurisdiction in situations where an equal protection violation involved a discriminatory treatment of a corporation's or person's property, see *Hornsby* v. *Allen,* 326 F. 2d 605 (5th Cir. 1964); *Cobb* v. *City of Malden,* 202 F. 2d 701 (1st Cir. 1953); *McCoy* v. *Providence Journal Company,* 190 F. 2d 760 (1st Cir. 1951); *Watchtower Bible and Tract Soc.* v. *Los Angeles County,* 181 F. 2d 739 (9th Cir. 1950); *Glicker* v. *Michigan Liquor Control Commission,* 160 F. 2d 96 (6th Cir. 1947); *Burt* v. *City of New York,* 156 F. 2d 791 (2d Cir. 1946).

Through the Enforcement of Burdensome Regulations, Defendant Public Service Commission Has Unduly Burdened the Free Flow of Interstate Commerce in Violation of the Commerce Clause of the United States Constitution, and Has Severely Hindered the Efforts of Appellants to Fulfill Their Duties and Obligations Under the Interstate Commerce Act. Defendants, Acting in Concert, Have Also Violated the Provisions of Said Act and the United States Constitution by Intentionally Assessing Appellants' Property in a Discriminatory Manner[4]

The Restraints Imposed by Defendants on Appellants Violate Congressional Regulation of Interstate Commerce as Expressed by Congress in the Interstate Commerce Act. Consequently, Jurisdiction in the Instant Case Is Authorized Under 28 U.S.C. Section 1337

Title 28 *U.S.C.* Section 1337, reads:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any

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[4] The duties and obligations imposed by Congress on a common carrier are set out in the *Interstate Commerce Act* under the heading "National Transportation Policy" as follows: (Act of September 18, 1940, C. 722, Title 1, Section 1, 54 Stat. 899, 49 *U.S.C.* note preceding Section 1). "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act; to promote *safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers* . . . encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . .—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act* (chapters 1, 8, 12, 13 and 19 of this title) *shall be administered and enforced with a view to carrying out the above declaration of policy.*" (emphasis added). See *Order of Railroad Teleg.* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 352 (1960), for general policy interpretation given by the courts to this section of the Act.

Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

The United States Congress considers cases which fall under Section 1337 jurisdiction to be of such significant national importanee that there is no requirement under this section that a complainant demonstrate any "amount in controversy" in order to invoke federal jurisdiction.

The issue as to whether *Tennessee Code Annotated* 67-906 B(2) is in violation of the Commerce Clause of the Constitution of the United States or whether said section is in conflict with the *Interstate Commerce Act,* thereby sustaining federal jurisdiction under Title 28 *U.S.C.* Section 1337, turns on the interpretation given to the allegations set forth in Appellants' Bill of Complaint; i.e., whether the District Court in ruling on Appellants' Motion for a Preliminary Injunction abused its discretion and erred in disregarding and dismissing as unreasonable the uncontradicted allegations in the verified Bill of Complaint and Affidavits filed by Appellants. It is well established that a properly verified Bill of Complaint is sufficient to support a Motion for Preliminary Injunction; and that well-pleaded allegations of a Bill and affidavits and exhibits attached thereto, to the extent that they have not been denied under affidavit by defendants, are accepted as true for the purpose of deciding an application for Preliminary Injunction. Moreover, on a Motion for Preliminary Injunction, a plaintiff need only demonstrate a "reasonable probability" rather than a "certainty" that he will ultimately prevail on a given issue.

The following uncontradicted allegations of fact appear in Appellants' Bill:

(1) They are "forced to have drivers stop their vehicles along roads that are often quite narrow and completely dark in order to search for road markers and signs that indicate where a county or municipality begins or ends"; (2) "There is no way to obtain this information from road maps . . . and absolutely no way to obtain said information except by having a report made from personal observation of signposts on the roads"; (3) Appellants are irregular-route carriers whose tractor-trailers and trucks "do not travel on fixed routes or schedules but make trips, dependent in each case, upon specific contracts between them and their customers"; (4) "The 'Commission' had insisted upon literal compliance with the said filing requirement of *Tennessee Code Annotated* 67-906 B(2), and its insistence has resulted in some of the Appellants expending a tremendous amount of time, effort and money in reporting in their ad valorem Assessment Reports the total miles operated in Tennessee by counties and municipalities" . . . and this expenditure is "grossly out of proportion to any conceivable benefits received from Tennessee." (As to the fact that the cost of compliance is often higher than the taxes involved, see Plaintiffs' Exhibit F, attached hereto as Appendix VII).

As to the safety violations inherent in the regulations imposed by Section 67-906 B(2) *T.C.A.*, the following facts stated in the Bill of Complaint must be accepted as true:

(At pages 23 and 24 of Petitioners' Bill of Complaint)

The Petitioners allege that in complying with *T.C.A.* 67-906 B(2) they have been forced to

violate a number of this Commission's safety regulations applying to stopped vehicles. Petitioners' drivers would be forced to spend at least forty-five minutes each and every time they stopped a vehicle along the roadside, if they were to comply with all the safety requirements of the Commission. (See *Code of Federal Regulations,* Title 49, Section 192.20-192.26, Subpart C, as to the requirements for setting out flares, lanterns, reflectors, *et cetera,* when a vehicle is stopped along a highway).

The District Court, without ruling on whether or not these facts were sufficient to invoke Section 1337 jurisdiction, held, in effect, that the reporting burden on Appellants was of their own making; that is, the Court stated that the statute in question "makes no provision as to how [the reporting] should be accomplished", that "the controlling factor is not the conduct or action of the plaintiffs but the requirements or exactions of the defendants imposed in compliance with the statute", and that "the method of compliance allegedly chosen by plaintiffs cannot be deemed a result of the challenge statute unless it is demonstrated that this method is the only practical way that the required reporting may be accomplished." (Appendix I, at pp. 4, 5).

The key to whether or not Appellants' methods are "the only practical ones" rests on whether or not it is impossible, as Appellants allege, to comply with the recording requirements through the use of maps. If they are correct concerning the lack of adequate maps, then it is obvious that the method they have chosen is the only practical one for filling out the mileage forms sent to them by the Tennessee Public Service Commission. Defendants have not denied under veri-

fied affidavit Appellants' allegations as to the unavailability of maps from which Appellants could garner the required information. The District Court did not mention either the name of, or the existence of, such maps, and only stated that Appellants' allegations are "unreasonable on its face since in normal travel it must be presumed that motor carriers use established routes and do not travel at random." This statement of the Court does not cover or attempt to answer Appellants' allegations as to the fact that the maps of Tennessee do not sufficiently mark the boundary lines of the local jurisdictions to enable Appellants to supply a breakdown of their mileage traveled in the taxing districts, counties, and municipalities of Tennessee. In addition, Appellants are, of course, not regular-route carriers, but irregular-route carriers, who, by definition, and as stated in their Bill, are carriers that do not use established routes or maintain regularly scheduled trips through Tennessee. (See Appendix III, at p. 13, for definition of irregular-route carrier in *T.C.A.* 67-901). It is important to note in regard to the reasonableness of Appellants' allegations that two Tennessee state courts have examined an attack by irregular-route motor carriers on the reporting requirements of *T.C.A.* 67-906 B(2), and in both decisions it was held that compliance with said requirements would be an impossibility. (See, for example, *Aero Mayflower Transport Company et al.* v. *Cayce Pentecost et al.*, in the Chancery Court, Part I at Nashville, No. 81411). The carriers in the *Mayflower* case found it so difficult to comply with the reporting requirements of *T.C.A.* 67-906 B(2) that they were unable to supply the Commission with the required information and thus the

state courts held that these carriers were in no position to complain that they had been unduly burdened or that the Commission had demanded strict compliance with the requirements. Assuming, *arguendo,* that the Tennessee state courts were correct in their analysis that an unconstitutional statute can be made constitutional by lax enforcement of state officials, the situation in the instant case presents an entirely different situation as to those Appellants who, at great expense, have supplied the required information. They have done so in accordance with the instructions, forms, and letters sent to them bi-annually from 1957 to the present by the Tennessee Public Service Commission. The forms sent out by the Public Service Commission to the Appellants not only include threats of penalties if the forms are not filled in *completely,* but also the forms are accompanied each year by a letter which reiterates that penalties will be exacted if the forms are not completed as designated. Defendants have not denied that these forms and letters were sent bi-annually in odd years, including 1965, to Appellants, or that many of the Appellants have literally complied with these forms and the requirements of *T.C.A.* 67-906 B(2).

The burdensome reporting requirements of *T.C.A.* 67-906 B(2) not only make it impossible for Appellants to provide the "economical", "adequate", and "sufficient" service, but also the "safe" operations required by the *Interstate Commerce Act.* (See Fn. 4 herein). In addition, it is also clear that the discriminatory taxing practice of Defendants, already described herein, has a substantial adverse economic effect upon the operations of Appellants and thus conflicts with the "National Transportation Policy of Congress" as

expressed in the *Interstate Commerce Act,* and the Commerce Clause of the Constitution of the United States. While this discriminatory taxing practice of itself is a sufficient restraint on Congressional regulation of interstate commerce to invoke Section 1337 jurisdiction, and while this point was raised below, the lower court does not even mention this ground for jurisdiction in its opinion.

The law concerning Section 1337 jurisdiction and the *National Transportation Policy* (49 *U.S.C.* Section 1) was clearly and succinctly set out in a recent case that presented an analogous situation to that of the instant case:

> (*Brotherhood of Rail. Train.* v. *New York Cent. R. Co.,* 246 F. 2d 114, at p. 120, (6th Cir. 1957).
>
> In the prevailing opinion of the court in *Toledo P. & W. R.R.* v. *Brotherhood of Railroad Trainmen,* the Court of Appeals, speaking through Judge Lindley, after commenting on the provisions of the Interstate Commerce Act, 49 U.S.C.A. Section 1 et seq., went on to say that *"From these provisions and others, it is clear that a carrier in interstate commerce is bound, not only to furnish carrying facilities for anyone desiring them, but to supply 'necessary, proper, adequate and safe' facilities."* The court stated that, because of the activities of members of the union, the plaintiff was rendered unable to furnish such facilities and was delayed and prevented from operating. *"Congress," said the court, "has seen fit to impose certain duties upon a common carrier engaged in interstate commerce, and the failure to perform such duties subjects the carrier to liability. It can not be that Congress imposed duties, and yet intended that the carrier should be denied federal relief from interference with carrying out such duties."* (Emphasis added).

(See also *Erie R.R. Co.* v. *Local 1286, International Longshoremen's Ass'n,* 117 F. Supp. 157, 159 (W.D. N.Y. 1953). The national importance of Section 1337-type cases was discussed in the 1953 *Columbia Law Review* (at pp. 157-196—See especially pp. 195-196) in an article by Paul T. Mishkin. Professor Mishkin, in addition to stating the obvious fact that interstate carriers are often in need of a federal forum in order to protect them from the local pressures and influences often present in the state courts, also points out that federal jurisdiction is necessary to safeguard congressional legislative programs. In interstate commerce, the national concern and policy are first established by congressional action. The balancing of competing values is not left to the courts, but is declared at least generally by Congress. *The protective forum in such circumstances is then principally a shield for federal legislation, and must of necessity be decided by federal courts.*

Accrued Penalties Must Be Added to the Cost of Compliance With Section 67-906 B(2) T.C.A., and to the Tax Liabilities Due by Appellants, in Arriving at the "Value" of the "Amount in Controversy" for Purposes of Invoking Federal Jurisdiction

The Ten Thousand Dollar "Amount in Controversy" Generally Applicable to Federal Jurisdiction Is Present in the Instant Case, Since a Sum Greatly in Excess of This Amount Has Already Accrued Against Appellants Under the Penalty Provisions of Section 67-913 T.C.A.

Apart from the various grounds set out herein which establish federal jurisdiction without regard to the "value" of a "matter in controversy", jurisdiction is also proper under those sections of the *United States Code* which require a $10,000 minimum "amount in controversy". As the Appellants have set forth

multiple and varied grounds as a basis for relief, the "matter in controversy" must be defined in terms of each of these grounds.

The District Court, without citing any case or textual authority for its conclusion, refused to consider as a part of the "matter in controversy" the accrued liabilities for penalties owed by Appellants under *T.C.A.* 67-913:

> (Appendix I, at p. 3) These penalties are not automatic, being enforceable only upon the request of the Public Service Commission. Tenn. Code Ann. Section 67-914 . . . In our view the possibility that such penalties may be invoked is of such speculative nature insofar as the actual controversy between the parties is concerned that it will not support an action in which jurisdictional amount is required.

T.C.A. 67-914 provides a means of *collection* of the penalties through suit by the Attorney General of Tennessee; *however, under T.C.A. 67-913 a $100 a day penalty has automatically accrued against those Appellants who have not filed the mileage information required by T.C.A. 67-906 B(2).* The question as to whether an accrued penalty liability is automatically enforceable or is enforceable at someone's discretion has never been considered by the courts as relevant in determining jurisdictional amount.

Healy v. *Retta* (292 U.S. 263, 268 (1934) sets out the accepted rule that, in situations such as in the instant case, where payment of a tax "does not avoid the penalty and end the dispute", the penalties are includable in computing jurisdictional amount. See also *M & M Transfer Co.* v. *City of New York,* 186 F. 2d 157 (2nd Cir. 1950).

The Courts of the United States Have Consistently Held That the "Value" of "the Matter in Controversy" for Jurisdictional Purposes Includes the Cost of Complying With the Regulatory Aspect of a Statute. In the Instant Case the Cost Incurred By Appellants in Complying With Section 67-906 B(2) T.C.A. Is Far in Excess of the Ten Thousand Dollars Minimum Specified for Federal Jurisdiction

One measure of the "value" of the "matter in controversy" centers on Appellants' allegations as to the cost of complying with the regulatory reporting aspects of *T.C.A.* 67-906 B(2). The lower court incorrectly ruled that the regulations complained of "were incidental to the taxing aspect of the statute and the amount in controversy is therefore the value of the tax and not the cost of compliance." While the Court's statement may be true in general, it has no application where the cost of complying with a taxing statute requires more than the filling out of forms, and actually involves an expenditure greater than the revenue produced by the tax. (See Appendix VII).

The General Rule Against Permitting Aggregation of Separate and Distinct Claims Against Several Defendants for Purposes of Determining the "Value" of the "Matter in Controversy" Is Not Applicable in the Instant Case. The Practice By Defendants of Intentionally, Systematically, and for a Long Period of Discriminating Against the Interests of Appellants Results in a Fraudulent Conspiracy to Injure Appellants. In Situations in Which Defendants Have Acted in Concert to Conspire Against a Plaintiff, the Courts Have Consistently Invoked the Exception to the General Rule and Permitted a Plaintiff to Aggregate Separate and Distinct Claims. Thus, the "Value" of the "Matter in Controversy" for Each Appellant Includes the Total of All the Taxes Levied By the Counties and Municipalities of Tennessee Against Said Appellant, Treating Said Taxes as a Single Assessment or Judgment and Considering Said Counties and Municipalities as a Single Tribunal

The ad valorem taxes imposed on Appellants by the counties and municipalities of Tennessee are: (1) based on a *state* statute, (2) assessed centrally by the *state* Public Service Commission, and (3) required to be equalized by the *state* Board of Equalization. Despite this, the lower court treated the ad valorem taxes imposed on Appellants by the 95 counties in Tennessee and numerous municipalities as separate, distinct claims, and held that each Appellant could not aggregate the taxes it owed to these subdivisions for purposes of computing jurisdictional amount. The District Court, in refusing to aggregate the taxes Appellants owed the subdivisions, erred not only because these taxes are based on a single, state levied assessment, but also because of the constructive conspiracy or fraud which must be imputed to the Defendants for their long-standing, systematic, and intentional discrimination against Appellants' property. (See cases listed in Fn. 3 herein for rule that long-standing, systematic over-valuation in assessments has always

been held by this Court to raise a "constructive fraud"). The law has long been settled that where a constructive conspiracy among separate defendants is demonstrated, the plaintiff may aggregate separate claims against each of these defendants for purposes of computing jurisdictional amount.[5]

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[5] 54 *Am. Jur.*—U.S. Courts, Section 110 (at pp. 749, 750). "The foregoing rule against aggregating claims against defendants is not applicable where their liability is joint, or where concerted wrongful action or conspiracy forms the basis of the complaint against them . . . *Frequently the right or property for which protection is claimed is so inseparably related to the acts of several defendants that although there is no conspiracy, in the strictest sense, the combined effect of their acts is regarded, and the value in controversy viewed, from the standpoint of the complainant.*" (emphasis added)

In *Taylor* v. *Louisville & N. R.R. Co.* 88 F. 350, 374 (6th Cir. 1898), a case frequently cited by this Court), the Tennessee ad valorem taxing statute was construed and the question of joint responsibility for normally distinct liability was considered as follows: "*The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination. Therefore the injunction might issue against the assessment upon the fully-assessed property, as void altogether, until a new and uniform assessment upon all property according to law could be made. And such is the rule in some courts*". . . . (emphasis added)

See also *Central Mexico Light and P. Co.* v. *Munch*, 116 F. 2d 85, (2d Cir. 1940, and cases cited therein).

The following facts demonstrate a concert of action on the part of Defendants: (1) The Constitution and laws of Tennessee demand uniform assessment of property for ad valorem purposes, yet there has existed for many years a long-standing discrepancy in assessment ratios between the counties and municipalities on the one hand and the state Public Service Commission on the other. (2) A three-judge court in the instant case held that this discrepancy in assessment ratios was approximately 50%; moreover, in the 1966 *L & N* case (at p. 249 F. Supp. 898), a 35% to 45% disparity in assessment ratios was characterized by the Federal District Court in Tennessee as "a clearly invidious discrimination which is systematic, *intentional,* and of long standing." (3) It has been alleged by Appellants in their Bill, and not denied by Defendants, that Defendants have been aware for many years of the discrimination in assessment ratios and that by their inaction and refusal to rectify same they have acted in concert to violate Appellants' constitutional rights. (4) The State Board of Equalization has had before it for many years the assessments of the counties and municipalities on the one hand, and those of the State Public Service Commission on the other, and year after year has refused to equalize same.

The logic and reason behind the rule which allows Appellants to aggregate the taxes it owes to the various subdivisions of Tennessee is well illustrated by the following: In its Motion to Dismiss, the Public Service Commission for the State of Tennessee states, among other things, that it should not be a party to the present litigation because its only action with respect to Appellants is to value their property at actual cash value and then send these valuations to the other Defend-

ants, all in accordance with the Constitution and laws of Tennessee. When considered in that light, that is, separate and independent from the actions of the other Defendants, there is no question as to the legality of the amount of the Commission's assessments. In like manner, Defendants Counties and Municipalities move for dismissal on the grounds that with regard to Appellants they simply receive the assessments sent to them by the State Public Service Commission and apply the same tax rate to these assessments as they do to locally assessed property. Again, if examined in this light, and without regard to the overall picture, the action of the counties and municipalities appears perfectly valid. It is only when the actions of the respective Defendants are viewed together that the discriminatory and fraudulent practice of taxing Appellants' property at valuations of 100% and local property on valuations of 50% is apparent. Indeed, if one were never to view such situations from the standpoint of the composite effect on plaintiffs, it would be impossible to ever have a legal remedy where the cause of action is based on a conspiracy. Consequently, where a concert of action is demonstrated, the courts have departed from the general rule against aggregating separate liability on the part of defendants and have tied together the separate actions of different defendants both from a substantive standpoint, which gives rise to a cause of action for conspiracy, and from a jurisdictional standpoint, which allows aggregation of separate claims against several defendants. (See Fn. 5 herein).

The Specially Convened District Court Abused Its Discretion in Granting the Defendants' Motion to Dismiss as to the Plaintiff, Commercial Carrier Corporation, Under the Venue Statute 28 United States Code § 1391

The District Court held that as to one of the Appellants, Commercial Carrier Corporation, the jurisdiction of a United States Federal Court was properly invoked by virtue of the presence of a substantial federal question and a tax liability of at least $10,000 owed by Commercial to the Defendant Shelby County. However, the Court dismissed this Appellant's cause of action on the basis that neither Commercial nor Shelby County resided in the Middle District of Tennessee and thus under the requirements of 28 *U.S.C.*, § 1391, this case could be dismissed for incorrect venue. In situations where incorrect venue is demonstrated, 28 *U.S.C.*, Section 1406 (a) gives a District Court discretion as to whether or not a case should be dismissed or transferred to the proper district. However, it is universally agreed that "dismissal will not usually be necessary, nor generally proper." "Dismissal of an action for improper venue is a severe penalty and should be reserved only for those actions which are instituted in an improper forum for purposes of harassment or in situations where some other element of bad fatih exists." (1 *Moore Federal Practice,* § 0.146-(1)-(5) (2d ed., 1948).

In the instant case, Commercial brought suit in the Middle District, not for purposes of harassment, but because the Middle District is the correct venue for this suit, provided jurisdiction is proper as to multiple plaintiffs. Both the courts and the text authorities are in agreement that in the absence of the element of bad faith in cases of incorrect venue the best

interests of justice are served by transferal of a case rather than by dismissal.

CONCLUSION

The questions presented in the instant case are of significant national importance and it is respectfully submitted that probable jurisdiction should be noted of this appeal.

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